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No. 89-1265

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN V. CAPOZZI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal district court has inherent authority to grant judicial immunity to defense witnesses.

2. Whether the district court properly ruled that petitioner could not use extrinsic evidence to impeach the testimony of a government witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 883 F.2d 608.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1989. A petition for rehearing was denied on October 6, 1989. Pet. App. 22. The petition for a writ of certiorari was filed on February 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted

on seven counts of wire fraud (18 U.S.C. 1343); five counts of mail fraud (18 U.S.C. 1341); two counts of receiving improper payments from a bank (18 U.S.C. 1006); and one count of conspiring to commit those offenses (18 U.S.C. 371). He was sentenced to eight years' imprisonment and was ordered to pay $2,470,000 in restitution. The court of appeals affirmed. Pet. App. 1-21.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that in 1983 petitioner purchased Bohemian Savings & Loan Association in St. Louis, Missouri. He then caused Bohemian to enter into various transactions that violated federal banking laws and that improperly benefited him and his associates. Pet. App. 2-6.

Petitioner, a Florida real estate developer, obtained a $945,000 construction loan from Bohemian in October 1982. During the negotiations for that loan, petitioner expressed interest in buying a bank. Bohemian's president, Dan Wood, suggested that petitioner join a group headed by Wood that was trying to purchase Bohemian, which was then insolvent. After the Federal Savings and Loan Insurance Corporation (FSLIC) rejected one proposal, petitioner tendered his own offer to FSLIC. Petitioner's plan called for FSLIC to infuse cash into Bohemian and for Wood to remain as president. FSLIC ultimately accepted petitioner's offer, and the sale was completed on December 1, 1983, with petitioner becoming the sole stockholder and chairman of the board of directors of Bohemian. Pet. App. 2-4.

Before he formally took over control of Bohemian, petitioner caused Bohemian to enter into at least two improper transactions. In October 1983, he had Bohemian turn over $140,000 to his associate, Jerome Nagelbush. That money supposedly was a real estate escrow deposit on a property known as Cedar Ridge; petitioner threatened to back out of his purchase of Bohemian if the payment were not made. Although Bohemian did not buy the property, the money

was never returned to the bank. Bohemian's chief financial officer later questioned the transaction and asked for documentation to provide to federal bank examiners. After consulting with petitioner, Wood described the payment as an interest-free loan. Petitioner also created documents after the fact to make the transaction appear legitimate. Pet. App. 4; 2/3/88 Tr. 39-44; 2/4/88 Tr. 111-117.

In another transaction that predated his purchase of the bank, petitioner used a corporation he owned – Camelot at University Park – to buy undeveloped land in Miramar, Florida, for some $510,000. Within days of acquiring Bohemian, petitioner had the bank contract to buy the Camelot property for $2,660,000. Petitioner did not disclose his ownership interest in Camelot; instead, he consistently represented that Jacob Fishman, who was his personal lawyer, headed the corporation. Petitioner concealed his ownership interest from Wood, from the other bank directors, and from federal regulators. Pet. App. 5, 6 n.5; 2/4/88 Tr. 65-72, 94-100. Petitioner also moved up the date of the closing on the sale to April 25, 1984, to ensure that the federal regulators' investigation of the bank did not interfere with the purchase.[1] Petitioner used a portion of the proceeds from the sale to make his required second and third quarterly installment payments on his purchase of Bohemian. Pet. App. 6; 2/4/88 Tr. 86-87.

In January 1984, petitioner caused the bank to buy another Florida property, an apartment and country club complex known as Emerald Hills. The purchase price was $10 million. However, petitioner had the bank's chief finan-

[1] The large profit from that transaction hinged on an inflated appraisal of the property. Petitioner obtained two appraisals that were too low for his purposes. He then hired an appraiser who arranged to appraise the undeveloped land as if it were developed. Pet. App. 5; 2/2/88 Tr. 120-127, 133-146, 158-169, 173-182.

cial officer wire an additional $200,000 to a development company that was owned by James Inklebarger, another of petitioner's associates. Petitioner claimed that the payment was a sales commission; in fact, Inklebarger's company played no part in the purchase of Emerald Hills and immediately transferred $198,000 of the $200,000 back to petitioner. Petitioner used $123,000 of that sum to make his first quarterly payment for the purchase of Bohemian. Pet. App. 5.

Petitioner and Wood also asked the bank's chief financial officer, Gary Schlette, to alter the bank's books and records to conceal certain disbursements that benefited petitioner and his associates. Schlette refused to do so and instead told federal authorities of his concerns. That information ultimately led to petitioner's indictment and conviction. Gov't C.A. Br. 9.

2. Four days prior to trial, the government filed a bill of particulars that named five unindicted co-conspirators; these included petitioners' associates Nagelbush, Inklebarger, and Fishman. At trial, petitioner sought to call those three individuals as defense witnesses. Outside the jury's presence, each man invoked his privilege against compulsory self-incrimination and declined to testify. The trial court ruled that because each had asserted his right to remain silent, petitioner could not call them as witnesses at trial.[2] Pet. App. 6-7.

Petitioner claimed that the three witnesses' testimony was crucial to his defense. When the government declined to seek

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[2] Petitioner did not ask two of the witnesses – Nagelbush and Inklebarger – their reasons for asserting the privilege. The third witness, Fishman, said he decided not to testify after learning that the government's bill of particulars had named him as an unindicted co-conspirator. At no point did petitioner's lawyer ask the trial court to inquire further as to the validity of the witnesses' Fifth Amendment privilege claims. Pet. App. 9 n.8.

use immunity for the witnesses under 18 U.S.C. 6002, the district court indicated it had no authority to order the government to offer statutory immunity to the witnesses. Petitioner then requested that the court grant the witnesses immunity based on its own inherent authority. The district court declined to do so. The court, however, permitted petitioner to introduce portions of the witnesses' testimony from sworn depositions in a related proceeding. Pet. App. 7-8.[3]

During his cross-examination of Schlette at trial, petitioner's counsel questioned Schlette about several specific instances of his conduct, including whether he had attempted to acquire another savings and loan association. Schlette answered all those questions. Pet. App. 15. Later, defense counsel sought to introduce evidence regarding Schlette's conduct. Relying on Fed. R. Evid. 608(b), the prosecutor objected on the ground that the proposed testimony constituted extrinsic evidence of specific instances of Schlette's conduct offered for the purpose of attacking his credibility.[4] Defense counsel claimed that the extrinsic evidence was admissible because it was offered to establish Schlette's bias and his motive for testifying against petitioner

[3] The depositions were taken during an FSLIC and Federal Home Loan Bank Board investigation of the activities of petitioner and Bohemian. Pet. App. 8.

[4] Fed. R. Evid. 608(b) provides in pertinent part:

> **Specific instances of conduct.** – Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

at trial. The district court held that the evidence did not bear on bias or motive and therefore excluded it. Pet. App. 15-16.

3. On appeal, petitioner renewed his claims concerning defense-witness immunity and the extrinsic evidence of Schlette's conduct. The court of appeals rejected both claims.[5] With respect to the issue of defense-witness immunity, the court noted that the only court of appeals that had held that a court has the power to grant judicial immunity to a defense witness was the Third Circuit in *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964, 974 (1980). Pet. App. 11-12. Although the court expressed doubts concerning the validity of the *Smith* case, it concluded that it did not have to decide that issue because, even assuming that a court could order a grant of judicial immunity, the facts in this case did not justify such relief. Because petitioner failed to point out any additional evidence that the witnesses would have provided at trial, the court of appeals held that the failure to immunize the three prospective witnesses did not impair petitioner's ability to present his defense to the jury. *Id.* at 14-15.

The court of appeals also upheld the district court's exclusion of extrinsic evidence of Schlette's alleged misconduct. The court recognized that facts tending to show a witness's bias are not collateral. As the court of appeals explained, however, there was no foundation for petitioner's claim that the extrinsic evidence was relevant to bias or motive on Schlette's part. The court therefore concluded that the trial court had not abused its discretion in refusing to admit the extrinsic evidence in question. Pet. App. 16-17.

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[5] The court of appeals also rejected petitioner's arguments that the mail and wire fraud counts were invalid under this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), and that, because no witness had identified him at trial, he was entitled to an acquittal. Petitioner does not renew those claims here.

ARGUMENT

1. Petitioner renews his contention (Pet. 8-18) that the district court had inherent authority to grant judicial immunity to prospective defense witnesses. The court of appeals, however, did not decide whether district courts have such authority. Instead, the court simply held that the circumstances in this case did not warrant a grant of judicial immunity to any of petitioner's witnesses, even assuming that district courts have the power to do so. Pet. App. 14-15.[6] Accordingly, the issue that petitioner seeks to litigate is not squarely presented in this case.

In *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964, 972 (1980), the Third Circuit ruled that judicial immunity can be invoked where the following conditions are satisfied: "[I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity." *Smith* underscored that testimony would fail to qualify under its rule if the testimony was ambiguous, cumulative, or not plainly exculpatory. *Ibid.* The same court later explained that in order to justify a grant of judicial immunity, the evidence sought by the defense must rise to the level that, if admitted, there is little doubt that the testimony would produce an acquittal. See *United States* v. *Lowell*, 649 F.2d 950, 964-965 (3d Cir. 1981).

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[6] The court stated:

> [W]e need not resolve, here, the ultimate question of whether a court has inherent authority to fashion such extraordinary relief as judicial immunity of potential defense witnesses. On these facts, we conclude the district court properly refused to grant judicial use immunity [to] Nagelbush, Inklebarger, and Fishman.

Pet. App. 15.

We disagree with the Third Circuit's conclusion that courts have "inherent" authority to immunize defense witnesses. The federal immunity statute, 18 U.S.C. 6001 *et seq.*, vests the power to grant immunity in the Executive Branch rather than the Judiciary. This Court accordingly has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). The corollary of that principle is that "[n]o court has authority to immunize a witness." *Ibid.* Not surprisingly, the great majority of the courts of appeals have held that judges may not immunize defense witnesses without a request from the prosecution.[7]

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[7] See, *e.g.*, *United States* v. *Hooks*, 848 F.2d 785, 803 (7th Cir. 1988); *Mattheson* v. *King*, 751 F.2d 1432, 1443 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986); *United States* v. *Pennell*, 737 F.2d 521, 527 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *Autry* v. *Estelle*, 706 F.2d 1394, 1401-1402 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *D'Apice*, 664 F.2d 75, 77 (5th Cir. 1981); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Alessio*, 528 F.2d 1079, 1080-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); see also *United States* v. *Eagle Hawk*, 815 F.2d 1213, 1217 (8th Cir. 1987), cert. denied, 484 U.S. 1012 (1988); *United States* v. *Hardrich*, 707 F.2d 992, 993-994 (8th Cir.), cert. denied, 464 U.S. 991 (1983).

Petitioner's suggestion (Pet. 15) that *United States* v. *Pennell*, 737 F.2d 521, 526 (6th Cir. 1984), cert. denied, 469 F.2d 1158 (1985),

The court of appeals in this case noted its skepticism about a court's authority to immunize defense witnesses. Pet. App. 12. The court correctly determined, however, that even assuming the existence of such judicial authority, petitioner did not satisfy the standards for invoking it. As the court of appeals pointed out, petitioner was able to present to the jury the same witnesses' earlier sworn deposition testimony. He thus had a fair opportunity to present his "version of the facts to the jury." Pet. App. 14. More fundamentally, petitioner has never indicated that the witnesses possessed additional evidence that would exonerate him. As the court of appeals explained, petitioner failed even "to delineate any suggested testimony over and above that which was presented to the jury." *Ibid.* Petitioner's argument therefore boils down to a claim that he is entitled to have his proposed witnesses immunized based on the speculative possibility that some favorable testimony might turn up. Such a claim would not prevail even under the most generous interpretation of *Smith*. There is accordingly no need for this Court to review the issue whether, in other situations, a court might enjoy the inherent authority to immunize defense witnesses.[8]

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supports his due process theory ignores that the court in that case explicitly refused to address any such claim, 735 F.2d at 526, and expressly disagreed with the holding in *Smith*, *id.* at 527. Likewise, petitioner's assertion (Pet. 16) that *United States* v. *Tindle*, 808 F.2d 319 (4th Cir. 1986), concluded that judicial immunity should be granted in certain circumstances is incorrect. The *Tindle* court observed that *Smith* has been "soundly criticized" and is "clearly the minority view," 808 F.2d at 325 n.4; it went on to reject the claim of judicial immunity in that case "[i]n light of Tindle's weak showing, and in light of the generally accepted view that a defendant has no right to defense witness immunity." *Id.* at 326.

[8] Petitioner argues (Pet. 10, 14, 15), for the first time, that he was entitled to have his witnesses immunized because the government im-

2. Petitioner also argues (Pet. 18-21) that the courts below improperly relied on Fed. R. Evid. 608(b) in denying him the opportunity to impeach Schlette through extrinsic evidence of Schlette's misconduct. This factbound claim warrants no further review.

Petitioner appears to argue that the court of appeals held, as a matter of law, that he was foreclosed from challenging Schlette's testimony for bias. The court of appeals, however, acknowledged that questions relating to a witness's bias are never collateral, and therefore that a defendant may introduce extrinsic evidence to show bias. Pet. App. 16-17. The court simply held that petitioner had failed to lay a sufficient foundation for the use of extrinsic evidence. As the court observed, *id.* at 17, the record failed to show that Schlette was attempting to curry favor with the government, so there was no showing of bias on Schlette's part. As such, the holding below simply constituted an application of a settled rule of law to a particular set of facts, not the announcement of a "new rule," as petitioner claims.

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munized some witnesses during the investigation of this case. But petitioner did not raise this argument below; instead, he relied only on the claim that the trial court had the power to grant judicial use immunity. See Pet. App. 11. Accordingly, petitioner is precluded from placing any reliance on the argument that defense witness immunity is required to balance the government's immunization of its witnesses. Moreover, the court below pointed out that the government did not immunize its trial witnesses, and that the chief witness, Bohemian president Dan Wood, testified pursuant to a plea agreement, not as the result of an immunity order. See Pet. App. 10 n.9.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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